

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 7, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket Nos. YORK 2000-89-M
	:	YORK 2000-90-M
RED COACH TRUCKING	:	YORK 2000-91-M
	:	YORK 2000-92-M

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On September 14, 2000, the Commission received from Red Coach Trucking (“Red Coach”) a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Red Coach.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its motion, Red Coach, which is represented by counsel, asserts that Mr. Bennett, the owner, did not receive these proposed assessments because he was not at the plant site where they were sent. Mot. at 1. It claims that Bennett was not aware that there were additional penalty assessments totaling more than \$18,000 when he paid the first penalty assessment, which he mistakenly believed was the only penalty assessed against Red Coach. *Id.* It contends that Bennett “called Mr. Petrie’s office” as soon as he received the subsequent penalty assessments,

and that the deadline for filing the green card passed during subsequent communications.¹ *Id.* at 1-2. Red Coach asserts that Bennett did not understand applicable procedural requirements. *Id.* at 2. It explains that the confusion was exacerbated by the fact that, at the time of the inspection giving rise to the penalty assessments at issue, Mr. Bennett was negotiating the sale of the plant, which was no longer in operation. *Id.*; Attachs. Attached to its request are correspondences Red Coach's attorney sent to MSHA regarding the plant's non-operational status and pending sale. Attachs. Red Coach requests that the Commission reopen the final orders, so that it may challenge the alleged violations and associated penalties. Mot. at 2.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Nat'l Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

¹ The signature page of Red Coach's motion identifies James Petrie as an MSHA District Manager.

On the basis of the present record, we are unable to evaluate the merits of Red Coach's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Red Coach has met the criteria for relief under Rule 60(b). *See, e.g., Cent. Wa. Concrete, Inc.*, 21 FMSHRC 146, 148 (Feb. 1999) (remanding where operator received penalty assessment, but such receipt was not brought to management's attention until deadline for filing green card had passed); *Ky. Stone*, 19 FMSHRC 1621, 1622-23 (Oct. 1997) (remanding where operator failed to contest penalty assessment due to its accounts payable department's internal processing error of penalty assessment); *M & Y Servs., Inc.*, 19 FMSHRC 670, 671-72 (Apr. 1997) (remanding to a judge where the operator failed to timely submit a hearing request because it allegedly did not receive assistance regarding the proper contest procedure until the deadline for filing had passed). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Commission Procedural Rule 60(b), 29 C.F.R. § 2700.60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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